United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: July 10, 1997

Case No.: 95 INA 601

In the Matter of:

ROBERTO'S MEXICAN RESTAURANT,
Employer,

on behalf of

RICARDO PEREZ PEREZ,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Ricardo Perez Perez (Alien) by Roberto's Mexican Restaurant (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions.

STATEMENT OF THE CASE

On April 28, 1993, the Employer, Roberto's Mexican Restaurant, filed an application for labor certification to enable the Alien, Ricardo Perez Perez, to fill the position of "Cook." AF 34. The job duties for the positions in question included the ability to prepare a full range of Mexican food items, and to use all standard restaurant equipment. Eight years of school, three months of restaurant training and two years of experience in the job offered were required, as was the ability to speak Spanish. The ETA 750A required that the applicant be able to schedule workers for the shift and handle inventory from the shift.

By correspondence dated February 11, 1994, the Employer was sent the resumes of six U.S. applicants. AF 67.[2] The record contains copies of letters dated February 16, 1994, wherein Employer invited U.S. applicants DePorra, Pamintuam, Carrillo, Marquez, Martinez and Lopez to come for an interview on February 24, 1993[sic] at 6:30 a.m. AF 61-66. Employer's account of its interviews with these applicants was as follows: (1) Mr. Carrillo was an hour late, which is unsatisfactory; (2) Mr. Lopez, Mr. Martinez, and Mr. DePorro did not appear or attempt to reschedule their interviews; (3) Mr. Marquez appeared on time, but told Employer he had had an accident and was not fast enough to do this type of work; and (4) Pamintuan did not speak Spanish, which is very difficult because Employer/owner does not speak English and would not be able to communicate with him, nor would the rest of the staff. AF 58.[3]

Several of the U.S. applicants completed questionnaires

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[2]The resumes of five U.S. applicants were forwarded to Employer's business address, as listed on ETA 750A, on January 28, 1994. AF 130. By letter dated February 4, 1994, Employer was advised that it had supplied an incorrect address on its ETA 750A, and that resumes submitted for Employer's consideration had been returned as "Undeliverable." AF 107. Employer was requested to submit an accurate business address as soon as possible.

[3]On March 18, 1994 Employer wrote the Employment Service Office, stating that although the U.S. applicant Cox was contacted on March 16, 1994, and she declined to be interviewed, because she had been hired by another employer. AF 54. After the Employer received the resume of Mr. Gonzalez, which was sent on April 28, 1994, he wrote a letter to Mr. Gonzalez on May 18, 1994. He also said he telephoned Mr. Gonzalez' home and spoke to his daughter, who indicated that Mr. Gonzalez had another job and that he probably would not be interested in an interview with the Employer. AF 68, 70. By his letter of May 25, 1994, Employer advised Mr. Gonzalez that he had telephoned him and had sent him a certified letter. When Mr. Gonzalez later phoned the Employer, he said he did not recall having applied for the position and that he was currently working at a job that he did not want to give up. AF 52.

regarding their contacts with Employer. Mr. Martinez indicated that he never heard from the Employer. AF 114. Mr. Pamintuan responded that an interview was set up, that he attended the interview, and that he was rejected because he did not speak Spanish. Mr. DePorra said the Employer never offered him an interview. AF 124. Mr. Carrillo said he was never called and that he never had an appointment for an interview. AF 129. Mr. Marquez reported that the Employer scheduled an interview with him at 6:00 A.M., but did not arrive until 8:00 A.M. AF 134. All of the U. S. job applicants indicated that they would have accepted the position if offered.

Notice of Finding. The CO's October 17, 1994, Notice of Finding (NOF) notified the Employer that certification would be denied, subject to Employer's rebuttal. The reasons were (1) that the Employer's foreign language requirement was a restrictive requirement under 20 CFR § 656.21(b)(2)(i)(c); (2) it appeared that a U.S. worker was rejected for other than valid job-related reasons in violation of 20 CFR 656.21(b)(6) and §§ 656.21(j)(1)(iii) and (iv); and (3) the Employer's recruiting was not performed in good faith recruiting. AF 22-27.

The CO directed the Employer to explain why it had rejected the U.S. worker, Mr. Marquez. Although Mr. Marquez had twenty five years of experience, the Employer found that he was "not fast enough to do this type of job." The CO noted at this point that the Employer had not shown how this worker demonstrated that he was not fast enough to do the work. The Employer's rejection of Mr. Pamintuan was also questioned, as he appeared to have a combination of education, training and/or experience that enabled him to perform the work required by this job, but for Employer's restrictive requirement which, itself, was at issue.

The CO then questioned why Employer did not attempt to contact Mr. Carrillo, Mr.DePorra, Mr. Martinez, and Mr. Lopez, until three weeks after their resumes were sent to him; why there was no evidence of any contact with Ms. Cox and Mr. Gonzalez; why Mr. Martinez and Mr. Carrillo, both of whom the Employer said it attempted to contact, reported on questionnaires that Employer had not contacted them at all; why Mr. DePorra said the Employer refused to interview him; and why Mr. Marquez reported that the Employer arrived two hours late for the interview the Employer had scheduled with him.

Rebuttal. On October 25, 1994, the Employer filed a document captioned "Response to Notice of Findings," in which it contended that the foreign language criterion was not a restrictive requirement because the owner, who is himself a newly legalized resident migrant, does not speak English. The Employer said that a non-Spanish speaking person would not be able to perform the duties of this job because Spanish is the language in which all

of the instructions and directions would be given. AF 14.

Employer contended that at the time of the interview Mr. Marquez said he had had an accident and that he was not fast enough to do this type of job, and so he declined the position. Employer also said Mr. Pamintuan was Filipino and that he did not speak either English or Spanish. Employer said that Mr. Carrillo was more than an hour late for his interview and that he, as well as Mr. DePorro were not telling the truth in describing their experiences with the Employer in their questionnaires.[4]

With regard to Mr. Martinez, Mr. Lopez and Mr. DePorro, the Employer stated that he had tried to contact them after he received the NOF. Mr. Martinez did not return telephone calls, and, even through the other two applicants were scheduled for interviews, neither of them appeared. When he telephoned Ms. Cox and reached Mr. Gonzalez, both of these U. S. applicants declined the Employer's offer of an interview.

Final Determination. on December 19, 1994, the CO denied certification in his Final Determination (FD). (1) The CO found that the Employer had failed to show that his foreign language requirement was a business necessity. (2) The CO did not accept the Employer's arguments explaining the rejection of the U. S. job applicants, on grounds that the evidence showed that two of them were rejected for other than lawful job-related reasons, and that six other applicants were not recruited in good faith. The CO explained that the Employer failed to explain why he was two hours late for the interview with Mr. Marquez, and found it incredible that an applicant who was injured to the extent that he could not work would wait two hours for the Employer to arrive for the interview. As to Mr. Pamintuan, the CO found that the Employer had failed to justify the foreign language requirement and that the Employer failed to evaluate this applicant's cooking skills.[5]

The CO observed that the Employer's attempts to re-contact Mr. DePorra, Mr. Martinez, Mr. Lopez and Ms. Cox, were neither requested nor authorized, as the Employer had been directed in the NOF to give evidence of a good faith effort to contact them originally. The CO also found that the Employer had failed to include in his rebuttal the information he was directed to

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[4]Apparently admitting that he had not supplied his correct mailing address, Employer said the Job Service contacted him by letter dated February 4, 1994, to request his current mailing address. After the applicants' resumes were remailed to him on February 12 or 13, 1994, the Employer later mailed letters to applicants on February 16, 1994 for appointments on February 24, 1994.

[5]Noting that the problem causing the delay in sending the resumes to the Employer resulted entirely from the Employer's error in completing ETA 750A, which was the reason that the Job Service sent the resumes to the wrong address.

furnish regarding Mr. Gonzalez in the NOF.

Appeal. On December 22, 1994, the Employer filed a motion for reconsideration, which the CO denied on February 2, 1995, and the CO then referred this matter to the Board. AF 01, 02. After the Employer filed a "Motion to Remand to the Certifying Officer for Reconsideration" on September 23, 1995, the Board issued an order on March 26, 1996. Noting that these cases were forwarded without a request for review, the Board found that it had no jurisdiction of the matter, and gave the Employer thirty-five days in which to seek review. Employer subsequently filed a request for review on April 15, 1996.

DISCUSSION

20 CFR § 656.21(b)(6) requires that, if U.S. workers apply for the job opportunity and be rejected, the employer shall establish that they were rejected solely for lawful job-related reasons. While the regulations do not explicitly state a "good faith" requirement as to post-filing recruitment, such a good faith requirement is implicit. **H.C. LaMarche Enterprises, Inc.,** 87-INA-607(Oct. 27, 1988). Consequently Employer's actions that indicate a lack of a good faith recruitment effort, or actions that prevent qualified U.S. workers from further pursuing their applications are a basis for denying certification.

The CO questioned this Employer's good faith recruiting of the U. S. applicants, finding the questionnaire responses of the U.S. applicants were more credible than representations of the Employer. It has been held that although an employer's assertion that it contacted applicants is entitled to some weight, the "independent assertions" by U.S. applicants, that they were not contacted, is entitled to "more weight." **Pak Trading Co.**, 90-INA-251(April 8, 1992). When an employer and an applicant contradict each other, and the employer offers no evidence to support its position, the CO may properly accord greater weight to statements by the U. S. applicants. **Jersey Welding & Fence, Co.**, 93-INA-43 (Oct. 13, 1993). In a comparable case, it has been held that the independent assertions of five U. S. workers that they were not contacted were entitled to greater weight than the employer's assertion of contact. **Victory Knits, Inc.**, 92-INA-320 (July 20, 1993).

In this case, the questionnaire responses from Mr. Martinez, Mr. DePorro, Mr. Carrillo, and Mr. Marquez contradict Employer’s assertions regarding his recruitment of them. Mr. Marquez, who was interviewed by the Employer, said that he would have accepted the position if the Employer had offered it to him, while the Employer contends that Mr. Marquez said he was not fast enough to perform this job. In resolving this conflict, guidance has been found in the holding that an employer's mere assertion that the

U. S. applicant had stated that he was not interested in the job was not sufficient to establish good faith effort to recruit where the U. S. applicant contradicted this representation. **Haroon's Mobil, Inc.**, 94-INA-180(May 15, 1995). In the instant case the circumstances require the same result. The CO properly discredited the Employer's bald assertions as to why he rejected Mr. Marquez, because they were neither supported nor corroborated by any evidence of record and and they were in direct conflict with the information provided by Mr. Marquez. The CO properly determined that there had not been good faith recruiting by Employer aftr considering the statements of the U. S. applicants who said in response to questionnaires that the Employer had not contected them. The CO's finding was supported by the lack of such documentation as certified mail receipts that would indicate otherwise in cooroboration of the Employer's statement.

Because the CO's application of the Act and regulations to the facts presented in this record, the CO's denial of labor certification was proper, and it is not necessary to address the remaining issues. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of certification is Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO.:95-INA-601

ROBERTO'S MEXICAN RESTAURANT, Employer
RICARDO PEREZ PEREZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 20, 1997